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Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

WILLIAM C. CROMER, PETITIONER

*v.*

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

MARK R. LIPPMAN
*Counsel of Record*
THE VETERANS LAW GROUP
8070 La Jolla Shores Drive,
#437
La Jolla, California 92037
(858) 456-5840

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

## QUESTION PRESENTED

UNDER THE LANDMARK CASE OF *FUNK V. U.S.*, 290 U.S. 371, 381-82 (1933), DOES THE FEDERAL JUDICIARY HAVE THE POWER TO MODIFY COMMON LAW PRINCIPLES, SUCH AS THE ADVERSE PRESUMPTION, TO FIT THE UNIQUELY PATERNALISTIC VETERANS ADMINISTRATION DISABILITY BENEFITS SYSTEM WHEN THE GOVERNMENT HAS LOST SOME EIGHTEEN MILLION (18) OFFICIAL MILITARY PERSONNEL FILES IN A MASSIVE FIRE, PREVENTING COUNTLESS VETERANS AND THEIR DEPENDENTS FROM RECEIVING THEIR ENTITLED DISABILTY BENEFITS?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner William C. Cromer ("Mr. Cromer") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported as *Cromer v. Nicholson*, 455 F.3d 1346 (Fed.Cir. 2006). It is reproduced in the Appendix (hereafter "App.") at 1a-12a. The opinion of the Court of Appeals for Veterans Claims (hereafter "The Veterans Court") is reported as *Cromer v. Nicholson*, 19 Vet.App. 215 (2005). It is reproduced at App. at 13a-20a.

## JURISDICTION

The Federal Circuit Court of Appeals' opinion was issued on July 11, 2006. App. at 1a. A timely petition for rehearing was denied on October 30, 2006. App. at 21a-22a. On December 22, 2006, the Supreme Court granted the application for an extension of time within which to file a petition for a writ of certiorari until March 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT PROVISION INVOLVED

1. Section 5107(a) of Title 38 of the Federal Code provides: "**Claimant responsibility**. Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for

benefits under laws administered by the Secretary."

## INTRODUCTION

No event has impacted the veterans' community like the great fire of 1973 at the National Personnel Records Center ("NPRC"), the facility where the government houses the records of all veterans. There, some eighteen (18) million Official Military Personnel Files were destroyed. And no issue has resonated in the case law like the effect of the fire, leaving The Veterans Court in the peculiar position of adjudicating claims with sizeable gaps in the record. The legal obstacles and impediments resulting from the fire's destruction have become an albatross for disabled veterans and their dependents, appearing in the first volume of the Veterans Court Reporter[1] and continuing to the present.[2]

It is an American tragedy. Through no fault of their own, veterans and their dependents find themselves in an impossible situation, having no way to prove their claims to service-connected disability benefits. Here, for example, Mr. Cromer presumably would have proven his claim for service-connected disability benefits if the government had not lost his records in the fire. Ironically, Mr. Cromer, like so many other veterans, must suffer for what appears to be the government's responsibility. This, in an administrative

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[1] *O'Hare v. Derwinski*, 1 Vet.App. 365, 366 (1991).

[2] *Russo v. Brown*, 9 Vet.App. 46, 51 (1996) (In the case of destroyed evidence, "[t]he caselaw does not lower the legal standard for proving a claim for service connection"); *Cromer v. Nicholson*, 19 Vet.App. 215 (2005) (same).

system designed to give every break to veterans.[3] This, in a nation forever grateful to its veterans.[4]

## STATEMENT

### A) History of Mr. Cromer's Disability

Mr. Cromer served active military duty from September 1945 to May 1947.

Mr. Cromer recalls that he drank contaminated milk at the army mess hall at Fort Sill, Oklahoma. Following his meal, Mr. Cromer came down with a very high fever. In October and November of 1945, he was hospitalized for related symptomatology, receiving sulpha drug therapy. Mr. Cromer's fever persisted at extremely high temperatures, causing him to lose consciousness for an undetermined period of time. Mr. Cromer's then-treating physician told him that he probably was suffering from brain damage (post-encephalic syndrome).

Two abstracts obtained from the Office of Army Surgeon General show that Mr. Cromer was hospitalized twice: once in October 1945 for two days, and once in November 1945 for seven days for treatment of symptoms of what was initially diagnosed as Peritonsillar Abscess and Acute Pharyngitis. Mr. Cromer's service medical records were destroyed by the 1973 NPRC fire. App. at 2a-3a.

On October 4, 1995, William H. Stout, M.D., Mr. Cromer's treating physician for over twenty years,

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[3] *Gilbert v. Derwinski*, 1 Vet.App. 49, 54 (1990).

[4] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.").

prepared a written opinion in support of his claim. Dr. Stout opined that Mr. Cromer's current dementia was secondary to the severe encephalitis and high fever he incurred during service.

On January 11, 2001, Craig N. Bash, M.D. prepared a medical opinion. In this report, Dr. Bash concluded:

> It is clear from the above medical record that this patient had two acute episodes of high fever within a week and he was hospitalized for several days. It is also clear that this patient lost consciousness and had burr hole done to relieve intracranial pressure. It is my opinion that this patient's severe inservice infections with meningitis/encephalitis directly caused his current long-standing dementia. This opinion is in agreement with the opinion of Dr. Stout...

Padmini B. Atri, M.D., who had treated Mr. Cromer while he was a VA physician in Richmond, prepared a medical opinion on Mr. Cromer's behalf. Based upon his interview with Mr. Cromer and a review of his medical records, Dr. Atri concurred with Dr. Bash's opinion that Mr. Cromer's dementia was related to his bacterial infection contracted in service.

**B) Destruction of Service Medical Records**

On July 12, 1973, a fire broke out at the NPRC, destroying approximately sixteen to eighteen million Official Military Personnel Files[5], including eighty (80)

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[5] Theodore J. Hull, The U.S. National Archives & Records Administration, Spring 2006, Vol. 38, No. 1 at 1.

percent of the service medical records ("SMRs") of Army veterans serving between November 1912 and January 1960 and a large number of records of Air Force veterans. *See Department of Veterans Affairs Procedure Manual*, M-21 Manual, Part III, Chap. 4, Sub.Chap. 4.23.

To many in the National Archives and Records Service ("NARS"), the fire's destruction at the NPRC building was no surprise:

> Although its design reflected careful planning, in actual function it was not a successful records center, being a somewhat curious blend of warehouse and office space. Perhaps the most notable difficulty was the lack of adequate provisions for firesafety.... As early as 1956, the year the center was completed, the National Archives and Records Service had decided that in the future all records center buildings constructed under its auspices would be equipped with sprinklers and smoke detection devices. It was thus natural that NARS was concerned with the serious lack of firesafety provisions in what was then the largest center in the nationwide records center system. That these fears were not unfounded became apparent in July 1973.

W. Stender & E. Walker, *The National Personnel Records Center Fire: A Study in Disaster*, 37 The American Archivest,Vol. 521, 524 (1974).

### C) The Effect of the Destroyed Service Medical Records

While the cause of the St. Louis Fire was never determined, two facts are undeniable: first, the government was responsible for the safekeeping of the SMRs, and two, veterans were not to blame for their destruction. *Moore v. Derwinski*, 1 Vet.App. 401, 405 (1991) ("where the records entrusted to the Government as custodian were destroyed"); *Willis v. Derwinski*, 1 Vet.App. 66, 70 (1991) ("since the VA lost the veteran's service records"); *Woodson v. Brown*, 87 F.3d 1304, 1307 (Fed.Cir. 1996) ("We do not decide, therefore, what effect, if any, the loss of the veteran's records due to no fault of the veteran (e.g., here where a fire in a government building allegedly destroyed Woodson's medical and dental records) has on that veteran's burden of proof under § 5107(a) when the lost records may be necessary to establish eligibility for benefits."). Thus, through no fault of their own, countless veterans were deprived of crucial medical evidence to prove their claims.

Specifically, without these records, many veterans, such as Mr. Cromer, were left in an impossible situation, having no way to prove the in-service incurrence element[6] of their claims for service-connected disability. *See Gregory v. Brown*, 8 Vet.App. 563, 569 (1996) ("there are no service medical records

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[6] To qualify for benefits for alleged service-connected disabilities, the claimant must prove three elements: "(1) medical evidence of a current disability, (2) medical evidence, or in certain circumstances lay evidence, of *in-service incurrence* ..., and (3) medical evidence of a nexus between the current disability and the in-service disease or injury. (Citation omitted)." *Pond v. West*, 12 Vet.App. 341, 346 (1999) (italics added).

(SMRs) to show an in-service rectal bleeding problem because the SMRs were lost or destroyed"); *Willis v. Derwinski*, 1 Vet.App. 66, 70 (1991) ("since the VA lost the veteran's service records, there was no way for the VA psychiatrist to confirm that the diagnosis of personality disorder had been made or why it was made"). In effect, the VA puts the veteran in a catch-22: the very evidence lost by the VA is now required to substantiate the veteran's claim.

### D) The Adverse Presumption

The general rule of proof is that the party who pleads a fact bears the burden of proving it. *See Selma, R. & D.R. v. United States*, 139 U.S. 560, 567-68 (1891).

The adverse presumption[7] is one of several common law exceptions to this general rule. This judicially-created rule of law began with the English case of *Armory v. Delamirie*, 93 Eng. Rep. 664 (1722). There, the plaintiff bailed a jewel with the defendant jeweler. When the jeweler failed to return the jewel, the court ruled that, unless the defendant produced the jewel, the jury would be instructed to apply an adverse presumption against him. Thus, *Armory* introduced the now-familiar principle that the loss or destruction of evidence gives rise to an adverse presumption against the offending party:

> That an adverse presumption may arise from the fact of missing evidence is a generally accepted principle of law that finds its roots in the 18th century case of the chimney sweeper's boy who found a jewel ring, took it to a jeweler for

[7] This doctrine has also been referred to as an adverse inference.

> appraisal, got back the ring minus the jewel, and brought an action in Trover. *See Armory v. Delamirie*, 1 Strange 505, 93 Eng.Rep. 664 (1722).

*Welsh v. U.S.*, 844 F.2d 1239, 1246 (6th Cir. 1988); *See Confederated Tribes of Warm Springs Reservation of Oregon v. United States*, 248 F.3d 1365, 1372 (Fed.Cir. 2001).

**E) The Federal Circuit's Decision**

In this case, the Federal Circuit Court of Appeals held that the adverse presumption does not apply where, as here, a veteran's SMRs have been destroyed by the St. Louis Fire. The court offered two reasons. First, there was no evidence that the destruction of the SMRs was due to the government's bad faith or negligence. App. at 11a. Second, there was no support in the statutory framework to warrant the imposition of the adverse presumption.

> In the absence of a statutory or constitutional imperative, it would be improper for this court to impose a judicial remedy to supplant or supplement the remedies and procedures already provided by Congress and the VA.

App. at 10a-11a.

While rejecting the application of the adverse presumption in the specific context of the St. Louis Fire, the lower court's holding necessarily extends to the government's loss or destruction of evidence in *all* VA claims. If, as the Federal Circuit decided, the statutory framework does not contemplate the adverse

presumption, then, as a matter of law, the presumption could not apply in any context.

This interpretation of the VA statutory framework cannot be squared with similar legislative schemes in other areas of the law. For example, through the Federal Rules of Evidence, Congress has provided an elaborate regime of evidentiary rules, some involving presumptions and burdens of proof. Conspicuously absent from this list is the adverse presumption. Yet, this common law principle enjoys wide acceptance among federal courts and administrative tribunals. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of American v. N.L.R.B.*, 459 F.2d 1329, 1336-38 (D.C. Cir. 1972). Thus, it is a cruel distortion of logic to read a Congressional intent to eliminate the adverse presumption from the paternalistic, pro-claimant VA system, while under a similar legislative scheme, the same common law principle flourishes in civil and other administrative fields.

## REASONS FOR GRANTING THE PETITION

### 1. THIS COURT SHOULD GIVE GUIDANCE TO FEDERAL COURTS AS TO THEIR POWER AND ROLE IN INTERPRETING AND APPLYING COMMON LAW PRINCIPLES

In *Funk v. U.S.*, 290 U.S. 371, 381-82 (1933), this Court outlined the federal judiciary's power to reevaluate, and to modify, if necessary, common law principles according to varying circumstances and conditions:

> [I]t is the question of the power of these courts, in the complete absence of the congressional legislation on the subject, to declare and effectuate, upon common-law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has been previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.

*Id.* at 383; *see also Rogers v. Tennessee*, 532 U.S. 451, 461 (2001).

Here, the lower court observed that, in applying the adverse presumption, the case law has always required, at a minimum, a showing of negligence[8]:

> Cromer has identified no decision in which an adverse presumption or inference was drawn in the absence of bad faith or, at a minimum, negligence. Conceding this failure, Cromer asks

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[8] Given the scale and complexity of the St. Louis fire, it would be difficult, if not impossible, for a VA claimant to obtain direct evidence of the government's negligence. After all, a disabled veteran has neither the resources nor legal means to establish the cause or fault of the NPRC fire, an event which occurred over thirty-four (34) years ago. Quite simply, the non-adversarial, ex-parte VA adjudication system does not provide for the type of civil discovery (e.g., subpoenas, depositions, interrogatories), necessary to ascertain this evidence. *See generally* H.R.Rep., 100th Cong., 2d Sess. 13 ("In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.").

> this court to create a new rule for the admittedly unusual circumstances presented by the "paternalistic" and nonadversarial context of veterans' benefits. This we decline to do. Congress, the VA, and the courts have been aware of the challenges posed by the loss of records in the 1973 fire for more than thirty years, and have enacted procedures intended to ameliorate those challenges for veterans.[9] That Cromer finds the procedures adopted by Congress and the Executive inadequate is not a sufficient basis on which this court can create a new rule that would alter the process for benefits claims.

App. at 11a.

The Federal Circuit's refusal to modify the adverse presumption to fit the "admittedly unusual circumstances presented by the 'paternalistic' and nonadversarial context of veterans' benefits"[10] is largely based upon misguided notions of judicial restraint. ***Funk* says that, in the absence of controlling legislation, the role of the federal judiciary is to define the meaning and application of evolving common law principles.** Indeed, we have already seen this core tenet played out in the

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[9] The Federal Circuit overstates the number and type of procedures in effect to relieve the evidentiary difficulties caused by the fire's destruction. As of yet, there have been no statutes or regulations enacted to address this problem. Indeed, the one existing procedure appears in the internal rules of the Veterans Administration. M-21 Manual, Part. III, para. 4.23 (2005) (VA must advise affected claimants of alternative evidence to submit in fire-related cases).

[10] App. at 11a.

development of the adverse presumption. Originally, courts required a showing of bad faith to apply the adverse presumption. *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 23-24 (1st 1981). Over time, however, the standard for invoking the presumption has been lowered to negligence as some courts have seen other rationales for the rule. *Welsh v. U.S.*, 844 F.2d 1239, 1245-49 (6th Cir. 1988). So too here, the rationale for the presumption in the context of VA claims calls for further modification. While a showing of negligence may be an appropriate requirement in tort litigation, it has no place in the uniquely benevolent, non-adversarial VA Disability Benefits System. *Stencel Aero Engineering Corp. v. U.S.*, 431 U.S. 666, 671 (1977) ("the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government").

Nonetheless, the Federal Circuit held that it lacked the power to relax the traditional requirements for the adverse presumption (i.e., to remove the negligence requirement) to fit the uniquely paternalistic VA system. Any modifications to the presumption, the lower court explained, must come from Congress or the Executive:

> In the absence of a statutory or constitutional imperative, it would be improper for this court to impose a judicial remedy to supplant or supplement the remedies and procedures already provided by Congress and the VA.

App. at 10a-11a.

The lower court's holding appears to collide with the principles set forth in *Funk*, 290 U.S. at 381-82. Mr. Cromer asks that the Court grant this petition to address whether federal courts have the power to modify common law rules, and, if so, to what extent.

## 2. THIS COURT SHOULD GIVE GUIDANCE ON THE INTERPLAY BETWEEN STATUTES AND COMMON LAW PRINCIPLES

For some time now, this Court has said that Congress legislates against a backdrop of common law principles. *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("for Congress is understood to legislate against a background of common-law adjudicatory principles"). Thus, to abrogate a common law principle, Congress must enact a statute, speaking directly to the common law in question. *U.S. v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law. (Citations omitted.)"); *Gordon v. U.S.*, 344 U.S. 414, 418 (1953) ("In the absence of specific legislation, questions of this nature are governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. (Citations omitted)."); *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("where a common-law principle is well established ... the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.' (Citation omitted).").

In this case, the Federal Circuit held that, through a general legislative scheme, Congress

intended to eliminate all common law principles of evidence, including the adverse presumption. App. at 9a-10a. Specifically, the court underscored the general evidentiary standard set forth in 38 U.S.C. § 5107(a), placing the burden of proof on the claimant. It then noted the specific statutes providing exceptions to this rule, (e.g. 38 U.S.C. § 105(a), 38 U.S.C. § 1116), as evidence of Congressional intent to exclude all other unmentioned evidentiary principles[11]. *Id.*

Section 5107(a) reads:

> *Except as otherwise provided by law*, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

Italics added.

The question in the present case is whether the underscored clause reveals a legislative design to exclude common law principles from the statutory regime. More specifically, does the term "by law" refer exclusively to legislative law (i.e., statutes and regulations), or does it apply to the common law as well? *See generally Landgraf v. USI Film Products*, 511 U.S. 244, 259-60 (1994) (Court notes that statutory clause, "Except as otherwise specifically provided", may in some cases show legislative intent to exclude unmentioned items).

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[11] *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (*"Expressio unius est exclusio alterius"*).).

## CONCLUSION

For the stated reasons, Mr. Cromer asks that this petition for a writ of certiorari be granted.

Respectfully submitted,
Mark R. Lippman, Esq.
Counsel of Record
The Veterans Law Group
8070 La Jolla Shores Drive,
#437
La Jolla, California 92037
(858) 456-5840

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05-7172
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WILLIAM C. CROMER,
Claimant-Appellant,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,
Respondent-Appellee.

July 11, 2006, Decided

COUNSEL: Michael A. Morin, Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P., of Washington, DC, argued for claimant-appellant. On the brief was Mark R. Lippman, The Veterans Law Group, of La Jolla, California.

Michael J. Dierberg, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and Deborah A. Bynum, Assistant Director. Of counsel were Richard J. Hipolit, Assistant General Counsel, and Ethan G. Kalett, Attorney, United States Department of Veterans Affairs, of Washington, DC.

JUDGES: Before BRYSON, GAJARSA, and LINN, Circuit Judges.

OPINION BY: GAJARSA

OPINION: GAJARSA, Circuit Judge.

William C. Cromer appeals from a decision of the United States Court of Appeals for Veterans Claims (the "Veterans Court") affirming a decision by the Board of Veterans Appeals (the "Board") denying his claim for service-connected disability. *Cromer v. Nicholson*, 19 Vet. App. 215 (2005) ("Cromer"). The parties assert jurisdiction pursuant to 38 U.S.C. § 7292. For the reasons set forth below, we affirm.

BACKGROUND

The critical fact here at issue is the loss of Cromer's service medical records, which apparently were destroyed in a massive fire at the National Personnel Records Center in 1973. The primary legal issues involve the appropriate burden of proof for establishing service connection for disability in circumstances where the relevant records were lost while in the custody of the government.

Cromer served in the active-duty armed forces from September, 1945, through May, 1947. *Cromer*, 19 Vet. App. at 216. In 1993, he filed a claim for disability based on service-connected dementia allegedly caused when he "suffered a fever of 108 degrees while assigned at Ft. Sill, Oklahoma, during November 1945 related to consumption of milk contaminated with streptococci agent." Id. The record indicates that Cromer attempted to acquire his service medical records to support his claim, but was told by the National Personnel Records Center that his records were unavailable and "were

likely destroyed in a fire in 1973." Id. In the absence of those records, Cromer supported his claim with a physician's statement indicating that his illness dated from his time in service. In addition, the Department of Veterans Affairs ("VA") sought and obtained other records on Cromer's behalf, including "hospital extracts from the Office of the Army Surgeon General. . . showing brief periods of hospitalization for pharyngitis and peritonsillar abscess in 1945." Id. The additional records did not directly support Cromer's claim.

The Veterans Administration Regional Office ("RO") denied the claim on May 25, 1994. Cromer then filed an application seeking to re-open his initial claim; the RO denied that application on April 6, 1996. Subsequently, in 1998, the Board remanded Cromer's case for further development.[1] The RO denied the remanded claim on July 26, 1999, concluding that no "new and material evidence" had been submitted sufficient to justify re-opening Cromer's claim. The Board affirmed that denial. While that decision was on appeal to the Veterans Court, the parties filed a joint motion seeking remand to the Board for further development and adjudication. The Veterans Court granted that motion on December 20, 1999. After further proceedings, the Board once again denied Cromer's claim. Before the Veterans Court, the parties filed another joint motion for remand, stating that Cromer had submitted new and material evidence sufficient to re-open his claim, and asking that the Board be permitted to review Cromer's case on the merits. On December 7, 2001, the Veterans Court granted that motion. After further proceedings, the Board denied Cromer's claim again, concluding that Cromer's "[d]ementia began many

years after service and was not caused by any incident of service."

On appeal to the Veterans Court, Cromer did not challenge the Board's finding that "the preponderance of the evidence is against the claim for service connection for dementia." Instead, he raised only a single issue, arguing that the Veterans Court should have applied an "adverse presumption" favoring service connection in circumstances where medical records are lost or destroyed while in possession of the government. *Cromer*, 19 Vet. App. at 216.

On July 8, 2005, the Veterans Court affirmed the Board's decision. *Id.* at 219. Noting that Cromer raised only the adverse presumption issue, it concluded that "the appellant has not raised any issue contained in the Board's decision," and that therefore "those issues are deemed abandoned." *Id.* at 217. It nevertheless considered Cromer's adverse presumption argument. It noted that the presumption Cromer sought was rooted in no statutory provision or recognized nonstatutory rule, but was grounded "solely on general principles of evidence and equity." *Id.* at 218. It then discussed what it considered the general rule that the "adverse-presumption rule has historically been associated with bad-faith" or negligent destruction of records, and concluded that because Cromer had "not demonstrated that either bad faith or negligent destruction of documents was implicated in the 1973 fire" that destroyed Cromer's records, it "need not decide whether the presumption advanced by the appellant should be adopted." Id. This appeal followed.

STANDARD OF REVIEW

In reviewing a decision of the Court of Appeals for Veterans Claims, this court "shall hold unlawful and set aside any regulation or any interpretation thereof. . . that was relied upon in the decision" of that court and which we find to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or without observance of procedure required by law. 38 U.S.C. § 7292(d)(1). We review issues of law without deference. *Andre v. Principi*, 301 F.3d 1354, 1358 (Fed. Cir. 2002).

DISCUSSION

A. Subject Matter Jurisdiction

Neither party disputes this court's subject matter jurisdiction under § 7292, but we are obligated to consider the issue sua sponte if reason exists to doubt that jurisdiction applies. *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1369 (Fed. Cir. 2004), cert. granted in part, 126 S. Ct. 543, 163 L. Ed. 2d 458 (2005), cert. dismissed as improvidently granted, 126 S. Ct. 2921, 165 L. Ed. 2d 399, 2006 U.S. LEXIS 4893, 2006 WL 1699360 (June 22, 2006); see also *Textile Prods., Inc. v. Mead Corp.*, 134 F.3d 1481, 1485-86 (Fed. Cir. 1998).

This court exercises jurisdiction over appeals from the Veterans Court "with respect to the validity of a decision of [that] Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was

relied on by [that] Court in making the decision." 38 U.S.C. § 7292(a) (2002). This court has interpreted its jurisdictional grant to permit review of "a decision of the Court of Appeals for Veterans Claims on a rule of law, "even where that rule of law was not "relied on . . . by the Court of Appeals for Veterans Claims in making its decision," so long as "the decision below regarding a governing rule of law would have been altered by adopting the position being urged." *Morgan v. Principi*, 327 F.3d 1357, 1361, 1363 (Fed. Cir. 2003) (internal quotations omitted) (describing this circumstance as "case" jurisdiction, as opposed to "issue" jurisdiction).

Here, two incongruities in the Veterans Court's opinion raise the possibility that we lack jurisdiction under § 7292(a) and Morgan. First, it appears that the Veterans Court would have affirmed the Board's decision regardless of the outcome of the adverse presumption question. Noting that Cromer failed to "raise[] any issue contained in the Board decision," thereby waiving all such arguments, it concluded that "the Board decision must be affirmed." *Cromer*, 19 Vet. App. at 217. Thus, the Veterans Court arguably resolved Cromer's appeal independently of the adverse presumption issue, rendering its discussion of that issue dictum. In that circumstance, the Veterans Court's decision would not "have been altered by adopting the position urged," and we would arguably lack jurisdiction under Morgan and its progeny. *Morgan*, 327 F.3d at 1363; see also *Wilson v. Principi*, 391 F.3d 1203, 1208 (Fed. Cir. 2004) (quoting Morgan).

Second, by its own terms, the Veterans Court did not technically reach the question of whether an adverse presumption of the kind sought by Cromer should

apply. The court clearly stated that "in the absence of the necessary factual predicate" for application of such a presumption--a finding of bad faith or negligence--"we need not decide whether the presumption advanced by the appellant should be adopted." *Cromer*, 19 Vet. App. at 219. If the Veterans Court affirmed without reaching the adverse presumption issue, its disposition of the case could not be altered by the adoption "of the position urged," and we again would lack jurisdiction under § 7292 and Morgan.

This is confusing, because Cromer appealed only one issue, and the Veterans Court, if its decision is read literally, declined to reach that issue. Nevertheless, we conclude that Cromer's appeal is properly before us. Although the Veterans Court's ruling is ambiguous in this regard, we interpret it to have reached the adverse presumption issue and decided it against Cromer. A contrary interpretation would be illogical, since it would result in the conclusion that the Veterans Court resolved the appeal without reaching the only issue that was properly before it. We therefore conclude that the Veterans Court resolved the presumption question in the government's favor.

We also conclude that a different resolution of the presumption issue would have altered the Veterans Court's disposition of the case. If the Veterans Court (and therefore the Board) erred in failing to apply the adverse presumption, then the Board's initial weighing of the evidence of service connection was also erroneous. Evidence that is insufficient to satisfy the preponderance standard in the absence of the presumption is not necessarily insufficient to satisfy the preponderance standard if the presumption is

operative. The conclusion that the adverse presumption should have applied to the service connection question would have required the Veterans Court to remand the case to the Board for further proceedings. We therefore have jurisdiction under the interpretation of § 7292 set forth in *Morgan*.

B. Justiciability

The government argues that Cromer's appeal is nonjusticiable because no relief would be available to him even if he prevailed on the adverse presumption issue. A claim is justiciable if it involves "a real and substantial controversy admitting of specific relief through a decree of a conclusive character." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990). Here, the government argues that Cromer's appeal is nonjusticiable because

> [E]ven if this Court were to grant Mr. Cromer's request and create the presumption that he requests, this presumption would not affect the outcome of his case because: a) the presumption could be overcome by a preponderance of the evidence; b) the board has already concluded that the preponderance of the evidence demonstrated that his dementia is not service connected; and c) Mr. Cromer has not challenged the board's conclusion regarding the preponderance of the evidence.

Although the government's argument carries a certain superficial force, we disagree. Cromer's appeal, by arguing that the adverse presumption should be applied to the determination of service connection, inherently

challenges the Board's application of the preponderance standard in making that determination. As we discussed above, evidence that is insufficient to satisfy the preponderance standard in the absence of the presumption is not necessarily insufficient to satisfy the preponderance standard if such a presumption is operative. A contrary ruling would render the presumption superfluous. The better answer, we believe, is that the operation of the adverse presumption would require a reassessment of the evidence by the Board. Thus, Cromer's appeal is susceptible of relief and presents a controversy that is justiciable in this court.

C. Adverse Presumptions

Cromer's claim breaks down into two components. First, he argues that because his medical records were in the custody of the government when they were destroyed by fire, the government should be presumed to have acted negligently in failing to preserve them. Second, he argues that once negligent destruction is presumed, an adverse presumption of service connection should be imposed against the government. Cromer's arguments in support of this double presumption lack merit.

First, neither presumption is rooted in any applicable statute, regulation, or judicial decision.[2] In fact, both presumptions are contrary to the general evidentiary burden in veterans' benefit cases, which requires that "a claimant has the responsibility to present and support a claim for [VA] benefits." 38 U.S.C. § 5107(a). The presumptions, by effectively shifting the burden of proof to the government, conflict with that standard.

Second, Congress and the VA have expressly carved out exceptions to the general rule of § 5107(a) where they deemed a shift in the burden of proof to be necessary or just--see, for example, 38 U.S.C. § 105(a) (creating a presumption that injuries incurred during active military service were incurred in the line of duty), and 38 U.S.C. § 1116 (creating a presumption of service connection for diseases associated with Agent Orange)--but have not done so here.

The VA is obligated by statute to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate" a veteran's claim for benefits. 38 U.S.C. § 5103A. The VA discharged that obligation here by seeking and obtaining alternative medical records to supplant the records apparently destroyed in the 1973 fire, and Cromer does not contend otherwise. The relief Cromer seeks would amount to a judicial amendment of the statutory duty to assist--a measure beyond the power of this court.

In addition, the VA, cognizant of the difficulties faced by veterans whose records have been lost, has enacted several regulations precisely to ease the evidentiary burdens faced by veterans whose records were lost in the 1973 fire. The VA Adjudication Manual provides a procedure for cases affected by the 1973 fire, requiring the VA to "assist the claimant in obtaining [medical] evidence from alternate or collateral sources" and listing ten alternate sources that "might substitute for service medical records in decisions relating to service connection for a disability." Similarly, in cases involving lost records, the Board has a heightened duty to explain its findings. See *O'Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991). In the absence of a statutory or

constitutional imperative, it would be improper for this court to impose a judicial remedy to supplant or supplement the remedies and procedures already provided by Congress and the VA.

Finally, Cromer has identified no decision in which an adverse presumption or inference was drawn in the absence of bad faith or, at a minimum, negligence. Conceding this failure, Cromer asks this court to create a new rule for the admittedly unusual circumstances presented by the "paternalistic" and nonadversarial context of veterans' benefits. This we decline to do. Congress, the VA, and the courts have been aware of the challenges posed by the loss of records in the 1973 fire for more than thirty years, and have enacted procedures intended to ameliorate those challenges for veterans. That Cromer finds the procedures adopted by Congress and the Executive inadequate is not a sufficient basis on which this court can create a new rule that would alter the process for benefits claims. Accordingly, we affirm the decision of the Veterans Court.

AFFIRMED

No costs.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Neither the decisions of the Veterans Court and the Board nor the parties' submissions to this court explain the reason for the 1998 remand.

n2 With regard to the negligence presumption, we note that at common law, the loss by fire of bailed goods did

not give rise to a presumption of bailee negligence. See, e.g., *S. Ry. Co. v. Prescott*, 240 U.S. 632, 640, 36 S. Ct. 469, 60 L. Ed. 836 (1916); *Hammond v. United States*, 173 F.2d 860, 863 (6th Cir. 1949). In Missouri, where the 1973 fire occurred, the bailor of destroyed goods has the burden of showing bailee's negligence, except in actions brought pursuant to a bailment contract. See *Thummel v. Krewson*, 764 S.W.2d 700, 705 (Mo. Ct. App. 1989). The government's custody of its own records is not a bailment in the classic sense, but the common-law rule is instructive in these circumstances. Following enactment of the Uniform Warehouse Receipts Act, some jurisdictions have reversed the common-law rule, but many--including Missouri--have not.

No. 03-0133

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WILLIAM C. CROMER,
APPELLANT,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,
APPELLEE.

July 8, 2005, Decided

JUDGES: Before IVERS, Chief Judge, and LANCE and DAVIS, Judges.

OPINION:

ORDER

The appellant, through counsel, appeals a January 15, 2003, decision of the Board of Veterans' Appeals (Board or BVA) that denied entitlement to service connection for dementia. Both parties filed briefs, and the appellant filed a reply. This appeal is timely, and the Court has jurisdiction over the case pursuant to *38 U.S.C. § 7252(a)*. For the reasons set forth below, the Court will affirm the Board's decision.

The appellant had active service in the U.S. Army from December 1945 to May 1947. Record (R.) at 20. In October 1993, he filed a claim for service connection for organic affective dementia, alleging that it came about

when he "suffered a fever of 108 degrees while assigned at Ft. Sill, Oklahoma during November 1945 related to consumption of milk contaminated with streptococci agent." R. at 172. His claim indicated that he tried to acquire his service medical records (SMRs) from the National Personnel Records Center (NPRC), but they informed him that his SMRs were not on file and were likely destroyed in a fire in 1973. R. at 173. His claim also included a physician's statement, saying that his mental disability dated from the time of his in-service illness. R. at 174. VA attempted to obtain alternative records, and in May 1994, it received hospital extracts from the Office of the Army Surgeon General (SGO) showing brief periods of hospitalization for pharyngitis and peritonsillar abscess in 1945. R. at 181-83. The appellant's claim was subsequently denied, and he unsuccessfully attempted to reopen the case in 1996. R. at 185, 253-55. The appellant appealed to the Board, and in March 1998, the Board remanded for readjudication. R. at 316-18. A November 1999 Board decision affirmed the regional office's (RO's) denial of the appellant's claim. R. at 387-99. The appellant appealed to this Court, and in December 2001, this Court granted a joint motion for remand. R. at 411. The appellant appealed to this Court again, and in December 2001, the Court granted another joint motion for remand. R. at 444. The Court's 2001 remand resulted in the decision presently on appeal.

In the decision on appeal, the Board concluded that the duty to assist had been satisfied. With regard to the merits of the claim, the Board denied service connection for dementia, finding that "dementia began decades after service, and there is no credible competent medical evidence to link it to service." R. at 16. The

Board noted that several medical professionals stated that the appellant's condition had its origin in service. However, the Board observed that no objective medical evidence supported those opinions. As the Board stated: "Since 1993, the veteran's story has been repeated by him to other doctors, and doctors have passed the story on to one another." R. at 14. The Board also stated that

> it is not until the 1990s, in connection with the claim for service connection, that the veteran came up with the story of the bad milk, brain infection, etc[.], in service. Then too, while his story may not be a conscious fabrication, it comes from an individual with dementia, and doctors have described his recent flawed memory, confusion, and other impaired thought processes surrounding his dementia illness. In sum, the veteran's account of in-service events is not credible.

R. at 15.

The appellant raises only one issue on appeal. He makes a policy argument, saying that the Court should apply an "adverse presumption" where SMRs have been lost or destroyed while in Government control, thereby requiring the Agency to disprove a claimant's allegation of injury or disease in service in these particular cases. He argues that an evidentiary imbalance is created by the Government's negligent destruction of SMRs, and thus he should be entitled to a presumption that shifts the burden of proof to VA to disprove his alleged in-service brain infection. The appellant does not rely on a statute or regulation from which the presumption

should be inferred but rather asks the Court to create a presumption based only on general rules of proof that create an unfair disadvantage and on equitable factors.

The Secretary argues for affirmance, because, he argues, the appellant has made no factual or legal challenge to the decision, he does not point to any error by the Board, and he does not take issue with the plausibility of the Board decision, the evaluation of the evidence, or the reasons or bases for the Board's decision. He also states that the appellant's policy argument advocating application of an adverse presumption is misconceived. Furthermore, he argues that, because the appellant offers no facial challenge to the Board decision, and explicitly waives all procedural issues on appeal, the appellant has abandoned the opportunity to challenge the Board's findings. Moreover, the Secretary asserts that the appellant's argument that the burden of proof should shift to the Secretary in cases where records are lost or destroyed is misconceived because the Court has previously addressed the issue and VA has acted in accord with the law. Finally, the Secretary argues that the adoption of an adverse presumption in cases where records are lost or destroyed would act to shift the burden of proof from the appellant to the Secretary, in contravention of statute.

This Court has long held that issues not raised on appeal are considered abandoned. *See Disabled Am. Veterans v. Gober, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000)* (stating that the court would "only address those challenges that were briefed"); *see also Bucklinger v. Brown, 5 Vet. App. 435 (1993)*. The appellant explicitly states that he is raising only one issue before the Court. Appellant's Brief at 6. He makes no argument with

respect to the Board's determination that dementia began many years after service and was not caused by any incident of service. Nor does he challenge the Board's legal conclusion that dementia was not incurred in or aggravated by service. Moreover, he points to no error by the Board with regard to the Board's heightened duty to explain its findings and conclusions when it is presumed that SMRs were destroyed. *See Russo v. Brown, 9 Vet. App. 46, 51 (1996).* Furthermore, he makes no attempt in his reply brief to argue against abandonment of the issues. Because the appellant has not raised any issue contained in the Board decision, those issues are deemed abandoned, and the Board decision must be affirmed.

The appellant does, however, make an argument with respect to adverse presumption. Initially, he relies on *Apusento Garden, Inc. v. Superior Court of Guam, 94 F.3d 1346 (9th Cir. 1996)*, but *Apusento* is not controlling on this Court, and it is inapposite. The Court notes that it has previously addressed the issue of lost or destroyed records held by the Government. In *O'Hare v. Derwinski, 1 Vet. App. 365, 367 (1991)*, the Court held that when SMRs are presumed destroyed, "the BVA's obligation to explain its findings and conclusions and to consider carefully the benefit-of-the-doubt rule is heightened." This rule has become well entrenched in the Court's caselaw. *Stewart v. Brown, 10 Vet. App. 15, 19 (1997)*; *Ussery v. Brown, 8 Vet. App. 64, 68 (1995)*; *Doran v. Brown, 6 Vet. App. 283, 286 (1994)*; *Gobber v. Derwinski, 2 Vet. App. 470, 472 (1992)*; *Moore v. Derwinski, 1 Vet. App. 401, 406 (1991).* Notably, the Court clarified this rule in *Russo*, where an appellant argued that he was entitled to a heightened "benefit of the doubt" because of the destruction of his SMRs. The

Court in *Russo* stated that established caselaw does "not establish a heightened 'benefit of the doubt,' only a heightened duty of the Board to consider applicability of the benefit of the doubt rule, to assist the claimant in developing the claim, and to explain its decision when the veteran's medical records have been destroyed." *Russo, 9 Vet. App. at 51.* In the present case, the Board noted the apparent destruction of records. The Board also noted that VA's additional efforts to obtain records resulted in the discovery of SGO extracts. Furthermore, the appellant has not complained, before this Court or the Board, that the duty to assist was not satisfied, or that the Board failed to recognize its heightened duty to consider the benefit of the doubt rule, to assist in development of the claim, or to explain its decision. *See Russo, supra.* Thus, because VA met its duty to assist the appellant, and the appellant made no effort to challenge VA's assistance, the Court finds that the duty to assist was satisfied.

The appellant would have this Court develop an adverse presumption against the Secretary based on the 1973 fire at the NPRC. The appellant relies upon an article that concludes the origin of the fire was never determined. Walter W. Stender & Evans Walker, *The National Personnel Records Center Fire: A Study in Disaster*, 37 THE AMERICAN ARCHIVIST, 521, 544 (1974). There are existing presumptions for service connection that have been created by Congress and codified in statute. The existing presumptions recognized in the VA statutory scheme generally relate to circumstances involving combat. *See 38 U.S.C. §§ 1116, 1117, 1118, 1133.* The appellant does not argue that the presumption that he seeks is derivative of any

of these presumptions, or is even implied by any other statute or regulation.

Furthermore, the Court has acknowledged widely accepted, nonstatutory presumptions relating to official acts. The presumption of regularity in mailing, and the presumptions of delivery and receipt are nonstatutory, judicially developed presumptions that avoid wasteful litigation about routine actions in the absence of clear evidence of nonperformance. *See Ashley v. Derwinski, 2 Vet. App. 62, 65 (1992)* (citing multiple United States Supreme Court decisions and holding that the presumption of regularity applies to official acts of public officers absent clear evidence to the contrary); *see also Matthews v. Principi, 19 Vet. App. 23, 27 (2005)* (describing the scope of the presumption). The appellant does not argue that the presumption he seeks is derivative of these or any nonstatutory presumption previously recognized by this Court.

Instead, the appellant argues that an adverse presumption against the Secretary should be adopted based solely on general principles of evidence and equity. This, the Court is unwilling to do where the appellant's argument does not apply to the facts of this case. As the appellant concedes, an adverse-presumption rule has historically been associated with bad-faith destruction of records. *See Morris v. Union Pac. R.R., 373 F.3d 896, 901 (8th Cir. 2004); see also Coates v. Johnson & Johnson, 756 F.2d 524, 551 (7th Cir. 1985)* (stating that bad-faith destruction of a document pertinent to an issue at trial gives rise to an inference against the party responsible for its destruction). Although recent cases have held that an adverse inference does not require a showing of bad faith and recognize that negligent destruction of

documents should also be sanctioned in order to restore the evidentiary balance, the appellant has not demonstrated that either of those circumstances is present here. *See Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)* (recognizing that a rebuttable presumption can be created against the defendant where the defendant is responsible for the negligent loss or destruction of evidence essential to plaintiff's case); *Welsh v. United States, 844 F.2d 1239, 1248 (6th Cir. 1988)*; *Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991)*. Again, we reiterate that the appellant has not demonstrated that either bad faith or negligent destruction of documents was implicated in the 1973 fire at the NPRC. Hence, in the absence of the necessary factual predicate, we need not decide whether the presumption advanced by the appellant should be adopted.

Upon consideration of the foregoing, it is

ORDERED that the January 15, 2003, Board decision is AFFIRMED.

DATED: July 8, 2005

PER CURIAM.

05-7172

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WILLIAM C. CROMER,
Claimant-Appellant,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,
Respondent-Appellee.

October 30, 2006, Decided

October 30, 2006, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

OPINION: ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for

rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 6, 2006.